Supreme Court, U.S.
JUL 29 1993

No. 92-1938

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether in light of *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988 & Supp. IV 1992), which expressly prohibits the states from imposing "any requirements" for pesticide labeling or packaging "in addition to or different from those required" under FIFRA, preempts state common law failure to warn claims against pesticide manufacturers.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition seeks review of the Eleventh Circuit's opinion on remand, which reaffirms in light of *Cipollone v. Liggett Group* the district court's interlocutory ruling that FIFRA preempts Petitioners' state common law failure to warn claims against Respondent Zoecon Corp.,[1] manufacturer and distributor of the FIFRA-labeled pesticide product involved in this case. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) ("*Papas II*"). The court of appeals concluded in its remand decision that "the *Cipollone* opinion dictates, under an express pre-emption analysis, the same result . . . reached earlier under the implied pre-emption doctrine." *Id.* at 518 (citing *Papas*

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[1] Zoecon has no subsidiaries which are not wholly owned. Its parent is Sandoz Agro, Inc., a subsidiary of Sandoz Ltd.

v. Upjohn Co., 926 F.2d 1019, 1026 (11th Cir. 1991) ("*Papas I*")).[2]

Contrary to Petitioners' assertions, this case does not involve the question of whether pesticide manufacturers should have "immunity" from product liability suits. The court's opinion in *Papas II* makes it clear that FIFRA preempts any state law claim which challenges, either directly *or* indirectly, the adequacy of the warnings on a pesticide manufacturer's federally regulated labeling, but does not preempt product liability claims that are unrelated to labeling or warnings. *Id.* at 519-20. Only Petitioners' failure to warn theories are at issue in this appeal; Petitioners remain free to pursue their non-warning related claims (i.e., design defect, manufacturing flaw) in the district court.[3]

No trial has been held in this case. There has been no finding that Petitioner Minas Papas's blood disorder was caused by his occupational use of Zoecon's federally registered veterinary pesticide product, Paramite, or that the minuscule amount of benzene impurity in one of that

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[2] In *Cipollone*, which was decided in June 1992, the Supreme Court held in pertinent part that the Public Health Cigarette Smoking Act of 1969 (hereinafter the "Cigarette Act") expressly preempts state law tort claims against cigarette manufacturers for failure to warn. *See* 112 S. Ct. at 2618-22. Section 5(b) of the Cigarette Act provides that "[n]o *requirement* or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [the Act]." 15 U.S.C. § 1334(b) (1988) (emphasis added). Rejecting the petitioner's argument "that common law damages actions do not impose 'requirement[s] or prohibition[s],' " the Court found that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Cipollone*, 112 S. Ct. at 2620.

[3] District court proceedings are being held in abeyance pending the outcome of this interlocutory appeal.

product's inert ingredients somehow "poisoned" him or otherwise created a health hazard. Indeed, if as Petitioners assert, Mr. Papas "was repeatedly and continuously drenched" by the product, he must have misused it rather than followed the label warnings, precautionary measures and directions for use approved by the U.S. Environmental Protection Agency ("EPA") pursuant to FIFRA. Pet. at 3.[4]

Petitioners' Complaint "asserted liability based on negligence, strict liability, and breach of an implied warranty of merchantability. Each of these claims was, in whole or in part, a claim of inadequate labeling for alleged dangers arising from exposure to the pesticides." *Papas II*, 985 F.2d at 517 (citing *Papas I*, 926 F.2d at 1020).[5] Contrary to the impression created by the petition for certiorari, there are no allegations in the Complaint (and no basis for Petitioners' insinuations) that Zoecon concealed product composition information from or made misrepresentations to EPA; nor have Petitioners alleged that Zoecon provided "non-labeling" warnings (e.g., point-of-sale signs, consumer notices), inadequate or otherwise.

The district court granted Zoecon's motion for partial summary judgment, holding that "any cause of action based on the defendant's failure to warn is preempted" by FIFRA. Pet. App. at 29a. On interlocutory appeal, the Eleventh Circuit affirmed. *Papas I*, 926 F.2d at 1021, 1027. The court of appeals passed over the question of express preemption in that pre-*Cipollone* decision. *Id.* at 1024. Instead, based on FIFRA's language, structure, purpose, and legislative history, the court concluded "that

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[4] Petitioners have filed a separate action against the supplier of the allegedly harmful inert ingredient in Zoecon's product. *Papas v. Koch Ref. Co.*, No. 90-790-CIV-J-16 (M.D. Fla. filed Sept. 6, 1990). That case also is being held in abeyance.

[5] As Petitioners note, their claims against The Upjohn Co., manufacturer of another veterinary product used by Mr. Papas, have been voluntarily dismissed. *See* Pet. at 3 n.2.

the federal government has occupied the entire field of [pesticide] labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions," and also "that jury awards of damages in such tort actions would result in direct conflict with federal law." *Id.* at 1024, 1025.[6] Five days after issuing its landmark opinion in *Cipollone*, the Supreme Court summarily vacated the Eleventh Circuit's judgment in *Papas I* and remanded the case for further consideration in light of *Cipollone*. *Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992).[7]

As this Court recently noted, *Cipollone* held that a "federal statute barring additional 'requirement[s] . . . "imposed under state law"' pre-empts common-law claims." *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737-38 (1993) (quoting *Cipollone*, 112 S. Ct. at 2620). FIFRA is such a statute. Section 136v(b), entitled "Uniformity," provides that a

> State shall not impose or continue in effect *any requirements* for labeling or packaging *in addition to or different from* those required under [FIFRA].

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[6] The court found in *Papas I* that "a jury determination . . . that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate." 926 F.2d at 1025. The court also found that the "case-by-case, state-by-state outside pressure on the regulatory process" resulting from "jury-found 'inadequacies' in labeling" would "hinder the development of an orderly, systematic, and uniform nationwide labeling scheme." *Id.* at 1026.

[7] Four months later, the Supreme Court took identical action in another pre-*Cipollone* FIFRA preemption case, *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.) ("*Arkansas-Platte I*"), *vacated and remanded*, 113 S. Ct. 314 (1992), *previous opinion adhered to*, 981 F.2d 1177 (10th Cir. 1993) ("*Arkansas-Platte II*"), *petition for cert. filed sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chem. Co.*, 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784). More recently the Court denied certiorari in *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (1993), a post-*Cipollone* FIFRA preemption case.

7 U.S.C. § 136v(b) (1988) (emphasis added).[8] Congress intended § 136v(b) "to completely preempt State authority in regard to labeling and packaging." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971); *see also* S. Rep. No. 838, 92d Cong., 2d Sess. 30 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4021 (the provision "preempts any State labeling or packaging requirements differing from such requirements under the Act"). Thus, as this Court explained in its only opinion on FIFRA preemption, pesticide labeling "fall[s] within an area that FIFRA's 'program' preempts." *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2487 (1991) (FIFRA does not preempt local government use restrictions).[9]

On remand, the Eleventh Circuit adhered closely to the preemption principles and analytical framework set forth in *Cipollone*:

> To determine FIFRA's pre-emption of the Papases' claims we will "only identify the domain expressly pre-empted" by FIFRA section 136v. *See Cipollone*, 505 U.S. at ——, 112 S.Ct. at 2618.
>
> . . . Section 136v(b) pre-empts those of the Papases' state law claims which constitute "requirements for labeling or packaging in addition to or different from" the labeling and packaging requirements imposed under FIFRA. *Cipollone* convinces

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[8] FIFRA defines "labeling" broadly to include not only the "label" (i.e., the sheet physically attached to the pesticide's container), but also "all other written, printed, or graphic matter . . . accompanying the pesticide . . . at any time." 7 U.S.C. § 136(p)(2).

[9] FIFRA differentiates between a state's authority to regulate pesticide "sale or use," which is preserved by § 136v(a) of FIFRA, and a state's imposing additional or different labeling requirements, which is expressly preempted by § 136v(b). *Compare* 7 U.S.C. § 136v(a) *with* § 136v(b). Section 136v(a) does not extend to regulation of labeling; indeed, its inclusion in FIFRA was necessitated by Congress' express preemption of state labeling requirements. *See Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2486.

> us that the term "requirements" in section 136v(b) "sweeps broadly and suggests no distinction between positive enactments and the common law." *Cipollone*, at ——, 112 S.Ct. at 2620. Common law damages awards are one form of state regulation and, as such, are "requirements" within the meaning of section 136v. *See Id.; Taylor v. General Motors Corp.*, 875 F.2d 816, 824 n.16 (11th Cir. 1989), *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). To the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's "labeling or packaging" failed to meet a standard "in addition to or different from" FIFRA requirements, section 136v pre-empts the claims.

Papas II, 985 F.2d at 518. Analyzing each of Petitioners' failure to warn theories, the court found that they, "like the failure to warn claims in *Cipollone*, require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product. This inquiry is precisely what section 136v forbids." *Id.*

Section 136v(b) vests EPA with "the sole and exclusive right to regulate pesticide label[ing]." *Papas I* at 1024. This enables EPA, which has the necessary resources, expertise and experience, to determine what warnings a pesticide product's manufacturer should provide, and ensure that the product's labeling, including the warnings on it, will be uniform (i.e., identical) throughout the United States. *See id.* at 1025 n.6. Uniformity promotes user comprehension and safety. In this manner, § 136v(b) helps to accomplish FIFRA's principal purpose, which is "to protect man and his environment." S. Rep. No. 838, at 1, *reprinted in* 1972 U.S.C.C.A.N. at 3993.[10]

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[10] This Court has described FIFRA as "a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Virtually every pesticide product sold or distributed in the United States must be registered and labeled pursuant to FIFRA. 7 U.S.C. 136a(a), (c)(5). Before granting a registration, EPA

The petition erroneously asserts that pesticide manufacturers "have wide latitude to decide the language of pesticide labels." Pet. at 4. In reality, EPA exercises absolute control over every word in every warning statement on every pesticide label. "EPA has regulated almost every aspect of pesticide labeling," including "the content, placement, type size, and prominence of the warnings and precautionary statements." *Papas I*, 926 F.2d at 1024; *see* 40 C.F.R. pt. 156 (1992). When a manufacturer applies to EPA for registration of a pesticide product, it must submit along with the application *draft* labeling prepared in accordance with EPA's pt. 156 labeling regulations. *See* 40 C.F.R. § 152.50(e) (1992).[11] EPA not only determines whether the draft labeling complies with the detailed requirements of pt. 156 (e.g., whether it includes the basic precautionary statements set forth in § 156.10(h)(2)(i)(B)), but also what specific additional warnings or precautions the manufacturer should provide, how they should be worded, where on the labeling they

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must find that the product, when used in accordance with its labeling, will not cause "unreasonable adverse effects." *Id.* §§ 136a(c)(5), 136(bb). This includes a determination by EPA that the product is not "misbranded." *See* 7 U.S.C. § 136(q); 40 C.F.R. § 152.112(f) (1992). A product is misbranded if, *inter alia*, its labeling "does not contain a warning or caution statement which may be necessary," or "does not contain directions for use which . . . are adequate to protect health and the environment." 7 U.S.C. § 136(q)(1)(F), (G).

[11] EPA's pt. 156 regulations provide that pesticide labeling "must show clearly and prominently . . . [w]arning or precautionary statements *as prescribed*" by EPA. 40 C.F.R. § 156.10(a)(1)(vii) (emphasis added). These encompass hazards to any persons who may be exposed to a pesticide. *See id.* § 156.10(h), (i). "Where a hazard exists to humans . . . precautionary statements are required indicating the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or damage." *Id.* § 156.10(h)(2)(i)(A).

should appear, and even what type size should be utilized.[12]

After EPA approves the initial registration of a pesticide product, it will require the manufacturer to amend the product's labeling to incorporate additional EPA-specified warnings, precautionary statements, or other information when and if EPA determines they are warranted. *See* 40 C.F.R. § 152.144 ("[T]he Agency may require a registrant to change a product's . . . labeling . . . to be reregistered and to maintain [the] registration in compliance with FIFRA.").[13] Under no circumstances are pesticide manufacturers allowed to add, delete, or modify warnings without EPA's prior review and approval. *See* 7 U.S.C. § 136j(a)(2)(A) (1988); 40 C.F.R. § 152.44.[14]

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[12] Each pesticide product represents its own unique combination of active and inert ingredients, type of formulation, physical and chemical characteristics, environmental behavior, uses, and toxicity. For this reason, it would have been impossible for Congress to specify in the text of FIFRA across-the-board label warnings applicable to all pesticide products. Instead, EPA regulates label warnings and precautionary information on a product-by-product basis, using the pt. 156 regulations as its minimum requirements. *See* 49 Fed. Reg. 37,960, 37,965 (1984). This is why, as Petitioners note, even pesticide products containing the same active ingredient may have different labels. *See* Pet. at 23.

[13] As part of the congressionally mandated FIFRA reregistration process, EPA reviews updated health and safety data needed to reassess whether a pesticide's labeling continues to meet the statutory requirements for registration. *See* 7 U.S.C. §§ 136a-1, 136a(c)(5)(B). If any labeling changes are warranted, EPA requires the manufacturer to make them in order to maintain the registration. *See* 7 U.S.C. § 136a-1(g). The active ingredient in Zoecon's product, like most of the 600 other active ingredients registered under FIFRA, is currently undergoing reregistration review. EPA also has an interim review procedure so that it can address special health or safety concerns at any time and require labeling changes as may be necessary. *See* 7 U.S.C. § 136a(c)(8); 40 C.F.R. pt. 154 (1992).

[14] Petitioners misleadingly assert that "[i]n many cases, a manufacturer need only notify the EPA that it is making the revision,"

The petition erroneously implies that EPA would have required additional label warnings had it been informed that Zoecon's product contained benzene. *See* Pet. at 5 n.4. Benzene in a pesticide product is of toxicological concern, and its presence needs to be disclosed to EPA and identified on a pesticide's labeling, only when it is deliberately added to the product as an inert ingredient, *not* where as here, there is a toxicologically insignificant amount (0.01% by weight) present as an impurity within one of the product's inert ingredients.[15] *See* 40 C.F.R. § 158.155 (1992) (EPA regulation regarding submission of product composition data); 52 Fed. Reg. 13,305, 13,305-07 (1987) (EPA policy statement on inerts discussing benzene). Petitioners' own toxicology expert testified at a preliminary hearing in this case that the benzene in Zoecon's product was not added as an inert ingredient, but was merely an impurity (a side reaction product) created during manufacture of one of the product's inert ingredients. Hearing Transcript at 12-13, *Papas v. Upjohn Co.*, No. 88-116-Civ-J-14 (M.D. Fla. Jan. 11, 1989) (testimony of William L. Marcus). Petitioners gloss over this crucial distinction and discuss the trace amount of benzene impurity in Zoecon's product as if it were an (intentionally added) inert ingredient. *See* Pet. at 4.

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and that "[o]ther revisions require no notification at all." Pet. at 4. While EPA's regulations permit a manufacturer to correct typographical errors and make certain other minor label modifications that do not require review of scientific data, those same regulations make it clear that any proposed additions, deletions, or changes to warnings or precautionary statements must be reviewed and approved by EPA. *See* 40 C.F.R. §§ 152.46(a)(1); 152.130(b).

[15] EPA regulations define "inert ingredient" as "any substance . . . other than an active ingredient, which is *intentionally* included in a pesticide product." 40 C.F.R. § 158.153(f) (1992) (emphasis added). An "impurity" is "any substance . . . in a pesticide product *other than* an active ingredient or an inert ingredient, including . . . side reaction products [and] contaminants." *Id.* § 158.153(d) (emphasis added).

SUMMARY OF ARGUMENT

There is no split of authority which meets this Court's criteria for granting certiorari. *Cipollone v. Liggett Group* has resolved whatever judicial "confusion and conflict" may have previously existed on FIFRA preemption of tort claims. In addition to the Eleventh Circuit, the First, Seventh and Tenth Circuits have held in light of *Cipollone* that § 136v(b) of FIFRA preempts failure to warn claims against pesticide manufacturers. No federal circuit, and no state supreme court, has held to the contrary since *Cipollone* was decided. The only court of appeals case ever to hold that such claims are not preempted was a much criticized, 1984 D.C. Circuit opinion which *Cipollone* effectively overruled.

Each of the other "splits" identified in the petition is a bogus conflict involving a subsidiary issue. For example, no court of appeals decision draws a distinction between tort claims for "inadequate labeling" and tort claims for "failure to warn" by means other than labeling. As the Eleventh Circuit recognized, *any* claim for inadequate warnings necessarily challenges the adequacy of the warnings on a pesticide product's EPA-approved labeling, and as a result, there are no warning claims "unrelated" to labeling.

Similarly, there is no judicial conflict created by the Eleventh Circuit's holding that a plaintiff cannot circumvent preemption by asserting that he intends to prove a pesticide manufacturer should have provided additional product composition information to EPA. Nor is there any conflict as to whether a plaintiff can avoid preemption by alleging that the manufacturer's failure to warn is a breach of an implied warranty.

Contrary to the assertions in the petition, the court of appeals gave full effect to the preemption principles established in *Cipollone*. On remand, the court narrowly interpreted in light of *Cipollone* the plain language of § 136v(b), and then proceeded to analyze Petitioners'

state law failure to warn claims and theories to determine whether each imposes additional or different labeling requirements within the meaning of that preemption provision. Having conducted this preemption analysis, the court held that FIFRA expressly preempts all of Petitioners' failure to warn claims against Respondent Zoecon Corp., since each of those claims in effect is a claim for inadequate labeling and would impose additional or different labeling requirements, but does not preempt those of Petitioners' product liability claims that are unrelated to labeling or warnings. The Eleventh Circuit's conclusion is correct and does not warrant Supreme Court review.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT OF AUTHORITY ON FIFRA PREEMPTION WARRANTING SUPREME COURT REVIEW

A. There Is No Post-*Cipollone* Conflict Among the Courts of Appeals or With a State Court of Last Resort

Petitioners concede this Court "recogniz[ed] that its analysis in [*Cipollone*] would shape the resolution of FIFRA preemption." Pet. at 9. Indeed, *Cipollone* has afforded the lower courts (and litigants) all the guidance they need on the question of whether FIFRA preempts state law failure to warn claims against pesticide manufacturers. There is no reason for the Court to revisit federal preemption of failure to warn claims so soon after *Cipollone*.

Petitioners' assertion that "there is a significant dispute about how to apply *Cipollone*" is wrong, at least as far as FIFRA preemption is concerned. Pet. at 18. In addition to the Eleventh Circuit in *Papas II*, three other circuits have addressed FIFRA preemption of failure to warn claims in light of *Cipollone*, and like the court of appeals below, *each* has held unequivocally that FIFRA preempts such claims. *See King v. E.I. DuPont de*

Nemours & Co., No. 92-2381, 1993 WL 232939 (1st Cir. July 7, 1993); *Shaw v. Dow Brands, Inc.*, No. 92-2323, 1993 WL 166324 (7th Cir. May 18, 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993) (*"Arkansas-Platte II"*), *petition for cert. filed*, 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784). Furthermore, one state supreme court has considered the issue since *Cipollone* was decided, and it too found preemption. *See Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (1993). The Eleventh Circuit's finding of preemption in *Papas II* is consistent with each of these decisions:

1. The plaintiff in *Arkansas-Platte* alleged that its property, the site of a former wood treating plant, had been contaminated by a wood preservative pesticide because, *inter alia*, the pesticide's manufacturer failed to provide adequate warnings about the product's environmental hazards. On remand from this Court for further consideration in light of *Cipollone*, the Tenth Circuit held "[t]o the extent that state tort claims . . . require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *Arkansas-Platte II*, 981 F.2d at 1179. The court of appeals explained that its previous finding of preemption is "re-enforced" by *Cipollone* "because the labeling provision of [FIFRA] § 136v(b) is as inclusive as that contained in § 5(b) of the Public Health Cigarette Smoking Act of 1969, which the [Supreme] Court held constituted a preemption of state common law labeling and duty to warn claims." *Id.* (citation omitted); *see Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992) (*"Arkansas-Platte I"*). The Tenth Circuit relied on *Cipollone* in rejecting the plaintiff's argument that the term "requirements" in § 136v(b) is limited to "positive enactments":

> [A] state common law duty to warn is nothing more than *a duty to label a product* to provide information. In that sense, *the common law duty is no less a "requirement" in the preemption scheme than a state statute imposing the same burden.* . . . Therefore, we believe it only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute. *Cipollone*, —— U.S. at ——, 112 S.Ct. at 2620 (state regulation can be accomplished by an award of damages or by legislative enactment). . . .
>
> We hold *Cipollone* supports our previous judgment in this case.

Id. (emphasis added).

2. In *Shaw v. Dow Brands* the plaintiff sued the manufacturer of a bathroom disinfectant, claiming that he became ill after using the product because its EPA-approved label did not contain adequate warnings.[16] The Seventh Circuit held that the plaintiff's arguments against preemption "evaporated last summer when the Supreme Court decided *Cipollone*." 1993 WL 166324, at *6. The court explained as follows:

> In order to succeed in the wake of *Cipollone*, [the plaintiff] would have to show that FIFRA's preemption language is less sweeping than the language of the 1969 Cigarette Act. Yet *we can discern no significant distinction at all*—FIFRA says that "[s]uch State shall not impose . . . any requirements for labeling or packaging in addition to or different from those required . . .," while the cigarette law says "[n]o requirement[s] or prohibition[s] . . . imposed under State law" shall be permitted. Both seem equally emphatic: "[n]o requirements or prohibitions" is just another way of saying a "[s]tate shall not impose . . . any requirements." *Not even the*

[16] Disinfectants are regulated as pesticides under FIFRA. *See* 7 U.S.C. § 136(u).

> *most dedicated hair-splitter could distinguish these statements. If common law actions cannot survive under the 1969 cigarette law, then common law actions for labeling and packaging defects cannot survive under FIFRA.* The Tenth Circuit recently held the same thing. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993) ("We believe also the prohibition of 'any' requirement is the functional equivalent of 'no' requirement. We see no difference between the operative effect of the two acts"). Because *Cipollone* destroyed whatever argument *Shaw* might have had about pre-emption, we are compelled to affirm the district court decision that FIFRA bars this action.

Id. (emphasis added).

3. *King v. DuPont* is the most recent court of appeals decision on FIFRA preemption.[17] The plaintiffs alleged that they suffered various ailments as a result of their occupational use of herbicides. They sued several pesticide manufacturers, alleging that the defendants failed to provide adequate warnings. After extensive discussion of *Cipollone,* the First Circuit held "that, in light of *Cipollone,* FIFRA preempts the plaintiffs' state law tort claims based on the defendants' alleged failure to provide adequate warnings about the health hazards of the herbicides they manufactured and sold." 1993 WL 232939, at *4. The court explained that

> [t]he warnings on the labels of the herbicides . . . were approved by the EPA, as FIFRA required. If the plaintiffs could recover on their state law claims that, despite this labeling, the defendants had failed to provide adequate warning, *those additional warnings necessarily would be "in addition to or different from those required under* [*FIFRA*]." . . .

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[17] *King* was decided after the petition for certiorari in this case was filed.

> . . . The FIFRA language prohibiting the states from "impos[ing] or continu[ing] in effect any requirements," 7 U.S.C. § 136v(b), is *virtually indistinguishable* from the state-imposed "requirement" language that *Cipollone* held preempted the state common law tort claims based on inadequate warning. . . .
>
> Our conclusion accords with the decisions of the three courts of appeals that, since *Cipollone*, have decided the question.

Id. at *4, *5 (emphasis added).

Thus, as Petitioners necessarily acknowledge, there is no post-*Cipollone* split among the circuits. *See* Pet. at 13 n.12.[18] Nor is there any post-*Cipollone* conflict with a state court of last resort. In *Davidson v. Velsicol Chemical Corp.*, the Nevada Supreme Court found implied preemption of state tort claims based on inadequate labeling. 834 P.2d at 937-38. Although Petitioners try to create a conflict between courts that have found express preemption and those that have found implied preemption, the Supreme Court observed only one week before *Cipollone* that those "pre-emption categories are not 'rigidly distinct.'" *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2386 n.2 (1992) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)); *see Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) ("Regardless of the avenue we

[18] It should be noted the Fourth Circuit concluded in a post-*Cipollone* decision affirming preemption of failure to warn claims under the Federal Hazardous Substances Act ("FHSA") that its pre-*Cipollone* finding of FIFRA preemption in *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir.), *defendant's renewed motion for summary judgment granted*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *notice of appeal docketed*, No. 93-1003 (4th Cir. Dec. 30, 1992), "comports with that in *Cipollone*." *Moss v. Parks Corp.*, 985 F.2d 736, 740 n.2 (4th Cir.), *cert. denied*, 61 U.S.L.W. 3852 (U.S. June 21, 1993) (No. 92-1736). The Fourth Circuit explained that the preemption provisions in FIFRA and FHSA are "nearly identical." *Id.* at 741 n.3.

follow—whether explicit or implied pre-emption—this state law cause of action cannot be sustained.") (holding that ERISA both expressly and impliedly preempts employee's state law wrongful discharge claim).

Therefore, the post-*Cipollone* "confusion and conflict among the lower courts" which Petitioners assert "[o]nly this Court can eliminate" simply does not exist. Pet. at 9, 14.[19] Because there is no post-*Cipollone* conflict on whether FIFRA preempts failure to warn claims, the petition should be denied.[20]

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[19] The thirteen other post-*Cipollone* decisions cited by Petitioners (all but two of which find preemption) are opinions from federal district courts, intermediate state appellate courts, or state trial courts. *See* Pet. at 12 n.11, 13 n.12 & n.13.

[20] The only court of appeals case holding that FIFRA does not preempt failure to warn claims against pesticide manufacturers was the widely criticized, 1984 D.C. Circuit opinion in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). "In deciding *Ferebee*, the District of Columbia Circuit did not have the benefit of the Supreme Court's subsequent analysis and ruling in *Cipollone*." *King v. DuPont*, 1993 WL 232939, at *6. *Ferebee* held that FIFRA does not preempt inadequate labeling claims on the theory that a damages award "is not equivalent to a direct regulatory command" to change the labeling, and hence, does not pose "requirements" for labeling within the meaning of § 136v(b). According to *Ferebee*, a pesticide manufacturer, when confronted with the prospect of continued state tort law liability for inadequate labeling, supposedly has a "choice of reaction": Rather than change the "tortious" label, the manufacturer may prefer to choose leaving it the way it is, while "simultaneously paying damages to successful tort plaintiffs." 736 F.2d at 1541. The Supreme Court made it clear in *Cipollone*, however, that express preemption of state law "requirements," as that term is used in a federal statute's preemption provision, encompasses requirements imposed through state tort law claims for damages. *See Cipollone*, 112 S. Ct. at 2620. This once and for all lays to rest *Ferebee*'s "choice of reaction" theory. *See Shaw v. Dow Brands*, 1993 WL 166324, at *6 ("[*Cipollone*] held that sweeping congressional efforts to pre-empt state regulation also bar state damages claims."); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1424-25, 1425 n.9 (5th Cir. 1993), *petition for cert. filed*, 61 U.S.L.W. 3870 (U.S. June 16, 1993) (No. 92-1989) (finding in medical device preemption

B. The "Several Different Splits" Described by Petitioners Are Contrived

Petitioners also erroneously contend that the "lower courts" are split on three ancillary FIFRA preemption issues. *See* Pet. at 14, 16, 17. None of these so-called "splits" is genuine or warrants Supreme Court review.

1. According to Petitioners, *Papas II* conflicts with two pre-*Cipollone* decisions "on whether FIFRA preempts state requirements with respect to warnings that do not accompany the product." Pet. at 14. The Eleventh Circuit held in *Papas II* that FIFRA preempts not only claims which directly challenge the adequacy of the warnings on a pesticide's labeling, but also "claims challenging the adequacy of warnings on materials other than the

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case that *Ferebee* did not survive *Cipollone*); *Casper v. E.I. du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 n.1 (E.D. Wash. 1992) (finding express preemption under § 136v(b) of FIFRA and noting *Ferebee*'s holding "that a verdict awarding damages 'is not equivalent to a direct regulatory command' . . . . appears to have been rejected in *Cipollone*").

Ferebee further held that a common law claim for inadequate labeling is not preempted because "tort recovery . . . may also promote legitimate regulatory aims" such as exposing dangers of pesticides or inducing label revisions. 736 F.2d at 1541. This Court subsequently observed, however, that in determining whether a common law tort claim conflicts with federal law, "it is not enough to say that the ultimate goal of both federal and state law is [the same] . . . . [a] state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (common law nuisance suit which could require adoption of different standards than those imposed by EPA to avoid future liability preempted by federal environmental protection statute); *see Papas I*, 926 F.2d at 1021. "The inevitable result of such suits would be that [the] States could do indirectly what they could not do directly—regulate . . . ." *International Paper Co. v. Ouellette*, 479 U.S. at 495.

The only state court of last resort to reject FIFRA preemption of failure to warn claims was *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 144 (Ark. 1992), a pre-*Cipollone* decision which relied on *Ferebee*'s now-defunct "choice of reaction" theory.

label or package of a product." 985 F.2d at 519. The court found the latter are preempted because they "necessarily imply that the labeling and packaging fail to warn the user." *Id.* As a result, the court explained that "[i]f a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, *its duty to warn is satisfied, and the adequate warning issue ends.*" *Id.* (emphasis added). This holding, which establishes that *any* failure to warn claim is a claim for inadequate labeling, in no way conflicts with either the Ninth or Second Circuit cases cited by Petitioners. *See* Pet. at 14, 15.[21]

Chemical Specialties Manufacturers Association v. Allenby, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S. Ct. 80 (1992), involved a challenge to a requirement under California Proposition 65 that manufacturers of consumer pesticides and other products provide certain state-specified point-of-sale warnings to the public. The Ninth Circuit held that FIFRA does not preempt that statutory warning requirement. *See* 958 F.2d at 944-48. *Allenby* did not involve the issue of whether tort claims for allegedly inadequate point-of-sale warnings are preempted, and, therefore, does not conflict with the Eleventh Circuit's holding in *Papas II* that such claims are preempted. *See* 985 F.2d at 519. Furthermore, the Ninth Circuit based its ruling on the grounds that point-of-sale signs are not "labeling," and that "there would be no need for companies to change their labels to comply with Proposition 65, *unlike the need to change labels in order to avoid state tort liability.*" *Allenby*, 958 F.2d at 948 (emphasis added). The court explained that "[s]ince FIFRA expressly preempts additional state labeling requirements, the *tort suits could circumvent the preemption clause by*

[21] As discussed above, Petitioners nowhere allege that Zoecon provided warnings which did not accompany its product. Warnings that did accompany the product would fall within FIFRA's broad definition of "labeling," and hence, even within Petitioners' artificially narrow category of "inadequate labeling claims." *See* 7 U.S.C. § 136(p)(2).

effectively requiring additional labeling to avoid tort liability even though the states do not expressly require the additional labeling." *Id.* (emphasis added). This is consistent with the holding in *Papas II* that common law damages awards are labeling "requirements" within the meaning of § 136v(b). *See* 985 F.2d at 518.

Petitioners' other supposedly conflicting case, *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2d Cir. 1989), did not involve warnings provided by pesticide manufacturers. The Second Circuit held that FIFRA does not preempt a state agency from promulgating pesticide use regulations requiring commercial *applicators* to provide certain notifications to the general public about their pest control activities. *See Jorling*, 874 F.2d at 119. There is no suggestion in the case that manufacturers of FIFRA-labeled pesticide products can or should be subject to additional warning requirements imposed by state law, much less through state common law tort actions. Furthermore, the Second Circuit emphasized that § 136v(b) of FIFRA "place[s] the 'labeling' of pesticides within the *singular province of the EPA*"; that "FIFRA's prohibition of state labeling 'in addition to or different from' that approved by the EPA has as 'its main focus . . . *preserving the force of the information contained in the FIFRA label*' "; and that "FIFRA 'labeling' is designed to be read and followed *by the end user*" (e.g., Petitioner Papas). 874 F.2d at 117, 119 (emphasis added). Again, this is consistent with *Papas II*. *See* 985 F.2d at 518 ("FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices.").

2. Petitioners also erroneously assert that *Papas II* creates a split "on whether FIFRA preempts state common law claims related to the manufacturer's failure to provide the EPA with complete and accurate information." Pet. at 16. The Eleventh Circuit held that Petitioners cannot circumvent § 136v(b) by asserting they intend to prove that Zoecon failed to disclose to EPA

that the product contained (a minute amount of) benzene. *See Papas II*, 985 F.2d at 519 ("[I]t is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made."); *see also Papas I*, 926 F.2d at 1026 n.8.

According to Petitioners, this somehow conflicts with the Fourth Circuit's pre-*Cipollone* decision in *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992), an agricultural crop damage case.[22] The petition quotes out of context *dicta* from *Worm* to the effect that a state duty "to maintain a label in accordance with the federal standards" would not conflict with FIFRA or be preempted. *See* Pet. at 17 (quoting *Worm*, 970 F.2d at 1309). This merely refers to state requirements that are "not 'different from' the federal standard." *Worm*, 970 F.2d at 1308.[23] In contrast, the Fourth Circuit's holding makes it clear that tort claims for failure to warn necessarily impose state labeling requirements which *are* different from the federal requirements, and hence, preempted:

> [S]urely a jury verdict resulting from a pesticide manufacturer's failure to warn of the dangers of the product has an effect no different from a legislatively enacted state regulation *requiring the insertion of a specific warning on the pesticide label*. . . .
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> . . . .

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[22] After the Fourth Circuit rendered its opinion in *Worm*, the district court issued a decision on remand, which the *Worm* plaintiffs now have appealed. *See Worm v. American Cyanamid Co.*, No. HAR-90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *notice of appeal docketed*, No. 93-1003 (4th Cir. Dec. 30, 1992). Accordingly, the court of appeals will have the opportunity to consider the impact of *Cipollone*, if any, on its previous decision.

[23] For example, a state requirement that a pesticide manufacturer distribute its product with EPA-approved labeling would be no different from the federal standard. The Fourth Circuit's *dictum* appears to suggest that a state tort claim for breach of such a state requirement would not be preempted. (The record in *Papas* establishes that Zoecon at all times distributed its product with EPA-approved labeling.)

> . . . [T]he language of § 136v(b) *manifestly ordains the preemption* of the establishment or enforcement of *any common law duty* that would impose a labeling requirement inconsistent with those established by FIFRA or the EPA in its regulations. If to avoid breaching a state duty a pesticide producer *is required to revise its pesticide labeling,* then the duty, common law or otherwise, is *preempted by § 136v(b).*

Worm, 970 F.2d at 1308-09 (citations omitted) (emphasis added). This too is consistent with *Papas II. See* 985 F.2d at 518 (§ 136v(b) preempts state law claims "which constitute 'requirements for labeling or packaging in addition to or different from' the labeling and packaging requirements imposed under FIFRA").

3. Petitioners assert that *Papas II* conflicts with the holding of an intermediate state court in Florida "on whether FIFRA preempts breach of warranty claims." Pet. at 17 (citing *Brennan v. Dow Chem. Co.,* 613 So.2d 131 (Fla. Dist. Ct. App. 1993)). Such a conflict would not meet this Court's standards for review. *See* S. Ct. R. 10.1. Furthermore, there is no conflict between the cases. *Papas II* holds that FIFRA preempts claims for breach of implied warranty of merchantability to the extent they are based on failure to warn. *See* 985 F.2d at 519-20. Unlike express warranties, which are voluntary contractual commitments, "implied warranties of merchantability arise by operation of law." *Id.* at 519; *see Cipollone,* 112 S. Ct. at 2622. The Florida case cited by Petitioners holds that FIFRA preempts claims for inadequate labeling, but not "the breach of warranty claim, since it was a common law claim arising out of a *voluntary contractual commitment.*" *Brennan,* 613 So. 2d at 132 (emphasis added). This is consistent with *Papas II,* whose finding of preemption is directed to involuntary warranties. Moreover, it is not clear from the *Brennan* decision whether the breach of warranty claim in that case was even based on a failure to warn theory.

II. THE COURT OF APPEALS REACHED THE CORRECT CONCLUSION IN LIGHT OF *CIPOLLONE*

A. The Court Properly Interpreted § 136v(b) of FIFRA

Pursuant to this Court's remand, the Eleventh Circuit analyzed "[i]n the light of *Cipollone* . . . FIFRA's pre-emptive effect on the Papases' claims under the express pre-emption doctrine." *Papas II*, 985 F.2d at 517. Recognizing that "[l]ike the statutes at issue in *Cipollone*, FIFRA contains a provision explicitly addressing, and providing a reliable indicium of, state authority," the court focused on FIFRA's preemption provision, § 136v(b), to " 'identify the domain expressly pre-empted.' " *Id.* at 517, 518 (*quoting Cipollone*, 112 S. Ct. at 2618).[24]

In *Cipollone* the Supreme Court interpreted narrowly the 1969 Cigarette Act's preemption provision, which prohibits states from imposing a "requirement or prohibition," but still found that it "easily encompass[es] obligations that take the form of common law rules." *Cipollone*,

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[24] There is no basis for Petitioners' contention that the court "failed to . . . discern congressional intent." Pet. at 19. The court carefully reviewed the language of § 136v(b), which is the best indication of Congress' preemptive intent. *See CSX Transp., Inc. v. Easterwood*, 113 S. Ct. at 1737 ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains *the best evidence of Congress' pre-emptive intent.*") (emphasis added). Furthermore, the court incorporated by reference its previous analysis of FIFRA's legislative history, which emphasized Congress' goal of achieving national labeling uniformity through preemption of any additional or different state requirements for labeling. *See Papas II*, 985 F.2d at 517 n.1 (citing *Papas I*, 926 F.2d at 1022-25). The court explained that the "objective of achieving uniformity in labeling was endorsed by Congress: in 1988, without changing the language of § 136v(b) . . . Congress added the heading 'Uniformity' to this section." *Papas I*, 926 F.2d at 1025; *see* Pub. L. No. 100-532, sec. 801(m)(2), 102 Stat. 2654, 2682 (1988). This rebuts Petitioners' assertion that Congress somehow "ratified" the D.C. Circuit's heavily criticized, and now effectively overruled, 1984 *Ferebee* decision. Pet. at 22.

112 S. Ct. at 2620. Based on *Cipollone*, the Eleventh Circuit found that FIFRA's prohibition against state imposition of "requirements," like the Cigarette Act's, " 'sweeps broadly and suggests no distinction between positive enactments and common law.' " *Papas II*, 985 F.2d at 518 (quoting *Cipollone*, 112 S. Ct. at 2620). Each of the three other circuits which has considered § 136v(b) in light of *Cipollone* also has held that its preemptive scope is as broad as the Cigarette Act's preemption provision. *See King v. DuPont*, 1993 WL 232939, at *4; *Arkansas-Platte II*, 981 F.2d at 1179; *Shaw v. Dow Brands, Inc.*, 1993 WL 166324, at *6.

Petitioners argue that the Eleventh Circuit should have interpreted § 136v(b) more narrowly in order to exclude common law claims. *See* Pet. at 20. Under Petitioners' convoluted interpretation, § 136v(b) is limited to positive enactments (and excludes common law claims) because it begins with the phrase "Such state," thereby supposedly incorporating § 136v(a), in which the word "regulation" appears. To the contrary, "[t]he word 'Such' in subsection (b) does not limit to state regulation the state 'requirements for labeling or packaging' which that section preempts." *King v. DuPont*, 1993 WL 232939, at *4. The Supreme Court found in *Wisconsin Public Intervenor v. Mortier* that § 136v(a) does not serve the function of limiting the types of state labeling requirements which § 136v(b) preempts; instead, it merely preserves the inherent authority of states to regulate sale and use of pesticides where "a narrow pre-emptive overlap might occur." 111 S. Ct. at 2486.[25]

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[25] Section 136v(a) provides that "[a] State may *regulate* the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the *regulation* does not permit any sale or use prohibited by [FIFRA]." 7 U.S.C. § 136v(a) (emphasis added). The word "regulation" in the second clause of § 136v(a) refers back to the verb "regulate" in the first clause, and thus, plainly means the act of regulating, which as *Cipollone* con-

Further, Petitioners' argument that FIFRA's preemption provision is narrower than the Cigarette Act's because the latter sets forth the text of the required warnings is a red herring. *See* Pet. at 8-9, 23. Unlike cigarettes, which are a relatively uniform product amenable to across-the-board warnings for the hazards they pose, pesticide products differ significantly from each other in terms of composition, use, and toxicity. *See supra* n.12. The fact that Congress vested EPA with the responsibility to devise appropriate warnings for each pesticide product in no way affects the scope of § 136v(b) or impairs the Eleventh Circuit's comparison of that preemption provision with the Cigarette Act's.

Petitioners also assert that common law claims do not impose "requirements in addition to or different from" FIFRA because they supposedly help protect health and the environment or are consistent with FIFRA's requirements. Pet. at 20-21, 27-28. This Court has held, however, that "[w]hatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field." *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. at 2387; *see Papas II*, 985 F.2d at 519. Therefore, "[a] state law action which shares the same purpose

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firms can take the form of common law damages claims as well as positive enactments. Furthermore, contrary to Petitioners' misreading of *Cipollone*, the Supreme Court was not making a general pronouncement on the meaning of the term "regulation" in federal statutes when it observed that "[r]ead against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to the [1964] Surgeon General's report [on smoking and health], the term 'regulation' most naturally refers to positive enactments by those bodies, not to common law damages actions." *Cipollone*, 112 S. Ct. at 2619. Instead, the Court was interpreting "regulation" solely in the context of the statement of purpose accompanying the Cigarette Act's 1965 statutory predecessor, whose preemption provision, the Court explained, Congress replaced in 1969 with the "much broader" preemption provision in the Cigarette Act. *Id.*

as the federal law in question is preempted if it attempts to achieve that purpose by a method which interferes with the federal methods." *Papas I*, 926 F.2d at 1026 (citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

B. The Court Considered and Rejected Each of Petitioners' Failure to Warn Claims

After finding in *Papas II* that § 136v(b) encompasses state labeling requirements imposed through common law damages claims, the Eleventh Circuit conducted the exact analysis called for by *Cipollone* to determine whether Petitioners' failure to warn claims are preempted:

> The Papases' concede that *each* of their negligence, strict liability, and breach of implied warranty counts *alleges in part that Zoecon failed to warn users* that its product contained certain harmful chemicals and failed to inform users to take appropriate precautionary measures. *Those allegations, like the failure to warn claims in Cipollone, require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product.* This inquiry is precisely what section 136v forbids. FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices. Thus, to the extent that the Papases' claims require a showing that Zoecon's labelling or packaging "should have included additional, or more clearly stated, warnings, those claims are preempted."

Papas II, 985 F.2d at 518 (quoting *Cipollone*, 112 S. Ct. at 2621-22) (emphasis added).

Petitioners rehash their arguments against preemption by erroneously contending that the Eleventh Circuit "failed to conduct the claim-by-claim analysis required by *Cipollone*." Pet. at 24. To the contrary, the court of appeals analyzed—and rejected with good reason—each

of Petitioners' failure to warn theories. *See Papas II*, 985 F.2d at 518-20.

1. Petitioners argue that because § 136v(b) preempts additional or different state requirements for "labeling," state law claims that a manufacturer failed to provide adequate warnings by means "unrelated" to labeling are not preempted. Pet. at 24-26. The court of appeals recognized, however, that "any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff *necessarily challenge* the adequacy of the warnings provided on the product's labeling or packaging." *Papas II*, 985 F.2d at 519 (emphasis added). Because such claims "necessarily imply that the labeling and packaging failed to warn the user . . . these claims are also pre-empted by FIFRA." *Id.* Furthermore, if preemption were limited to claims which directly challenge the adequacy of labeling, a plaintiff always could circumvent § 136v(b) by alleging that a pesticide manufacturer should have provided additional or different warnings by means other than labeling. As a result, "FIFRA's language . . . preempts the state law lack-of-warning claims involved in this case." *King v. DuPont*, 1993 WL 232939, at *4.

2. Petitioners argue that failure to warn claims based on breach of an implied warranty are not preempted. *See* Pet. at 26. As the court explained, however, Petitioners misplace reliance on *Cipollone*, which only addressed claims for breach of express warranties, finding that they (unlike implied warranties) are voluntarily assumed, and hence, not state-imposed requirements subject to preemption. *See Papas II*, 985 F.2d at 519.

3. Petitioners argue that claims for "misrepresentation" (which they apparently equate to a manufacturer's unintentional non-disclosure of trace chemical impurities) are not preempted because they supposedly are consistent with certain FIFRA requirements (e.g., the requirement

not to distribute a "misbranded" pesticide). Pet. at 26-29. The court of appeals rejected this argument:

> As we noted in *Papas I*, it is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made. *See Papas I, supra,* 926 F.2d at 1026 n.8. States may not interfere with the methods designed by Congress to achieve FIFRA's goals. *See Gade v. National Solid Wastes Management Association,* —— U.S. ——, ——, 112 S.Ct. 2374, 2385, 120 L.Ed.2d 73 (1992). We think FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures.

Papas II, 985 F.2d at 519. The court also found that "[b]ecause [Petitioners'] 'misbranding' theory is inseparable from FIFRA procedural requirements [there is] no merit in [their] contention that this theory of recovery is based on a generalized 'duty not to deceive.'" *Id.* at 518 n.2 (citing *Cipollone*, 112 S. Ct. at 2624).[26]

Therefore, having carefully analyzed each of Petitioners' failure to warn claims in light of *Cipollone*, the Eleventh Circuit correctly concluded "that FIFRA expressly preempts state common law actions against manufacturers of EPA-registered pesticides to the extent that such actions are predicated on claims of inadequate labeling or packaging. . . . Claims that do not challenge Zoecon's labeling and packaging practices are not preempted." 985 F.2d at 520.

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[26] FIFRA makes it unlawful to sell a misbranded pesticide. *See* 7 U.S.C. § 136j(a)(1)(E). It is well settled, however, that there is no private right of action for violations of FIFRA. *See, e.g., Almond Hill School v. United States Dep't of Agric.*, 768 F.2d 1030, 1036 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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